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April 27, 2007

Justice Charles W. Johnson  
Rules Committee Chair  
c/o Clerk, Washington Supreme Court  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504-0929

RE: Proposed Criminal Rules 4.8

Dear Justice Johnson,

I am writing in response to the publication of proposed CrR 4.8 concerning the issuance of subpoenas in criminal cases. I was a member of the WSBA Rules Committee and was on the subcommittee that addressed this proposal. The prosecutors on that committee objected to the proposed rule's provision eliminating notice for certain subpoenas duces tecum. I am writing to recommend that the Court either reject the proposed rule or enact it with a revised notice provision. The proposed rule is flawed because it changes the law without any showing that such a change is warranted and will allow for the abuse of the subpoena power.

Under current law, when a party issues a subpoena duces tecum, notice must be provided to the opposing party. State v. White, 126 Wn. App. 131, 107 P.3d 753 (2005). Such notice is also required in civil cases. In fact, the proposed new civil rule concerning subpoenas requires *advance* notice to the opposing party before the subpoena is served on the third party from whom the documents are sought. See proposed Civil Rule 45(b)(2). The comment explains "[t]his requirement is designed to allow parties sufficient time to assert any privileges or objections prior to the recipient complying with the subpoena by delivery of documents to the issuing party." GR 9 Cover Sheet, Suggested Amendment to Civil Rule (CR) 45.

In contrast, proposed CrR 4.8 eliminates the requirement that notice of a subpoena duces tecum be provided except in certain instances. Notice is only required when a party seeks documents relating to a defendant, a victim or victim's family. See proposed Rule 4.8(b)(2)(i). Notice is not required when a subpoena is issued seeking records of a witness or third party. Accordingly, if a defendant issues a subpoena duces tecum seeking bank records or telephone records of a witness in a criminal case, no notice to the opposing party is required.

I know of no valid reason to afford less protection to witnesses or third parties in criminal cases. Under Washington law, a defendant's right to demand such discovery is more limited than in civil cases, See State v. Norby, 122 Wn.2d 258, 266, 858 P.2d 210 (1993); State v. Gonzalez, 110 Wn.2d 738, 744-45, 757 P.2d 925 (1988). A defendant is only entitled to

discovery from a third party upon a showing that the information is material and that the discovery request is reasonable. Norby, 122 Wn.2d at 266.

As the current Criminal Rule and proposed Civil Rule recognize, it is inappropriate and unrealistic to rely upon a third party to whom the subpoena is directed to object to an improper subpoena. The third party will not have information necessary to assess whether the request is material or reasonable. Witnesses or third parties without legal training may be unaware that they even have the right or ability to contest an overbroad or improper subpoena. Moreover, subpoenas in criminal cases are often directed to institutions, such as banks, schools, hospitals, daycare centers, employers, etc., seeking records concerning witnesses. Those institutions do not always have the same strong interest as the individual concerning the disclosure of potentially private or sensitive information. Proposed CrR 4.8 allows a party issue a subpoena duces tecum in secret without an appropriate check on the potential abuse of power.

At the Rules Committee meetings, I did not hear any justification offered as to why no notice should be provided for subpoenas seeking records relating to witnesses or third parties. No such justification is set forth in the GR 9 statement explaining the rule. Some defense counsel expressed an interest in being able to seek documents relating to their client, the defendant, without having to provide notice to the State. The proposed rule covers that concern elsewhere by allowing defense counsel to subpoena documents relating to the defendant without providing notice. See proposed CrR 4.8(b)(2)(ii). The concern about seeking a client's own records held by a third party does not justify eliminating the notice requirement for subpoenas directed to *all* third parties or witnesses.

The notice provision for subpoenas duces tecum were hotly contested at the Rules Committee meetings. At the first straw vote on the issue at the April 17, 2006 meeting, a majority supported providing full notice. The next month, the more restricted notice provision passed by a vote of 9 to 6.<sup>1</sup> Somewhat ironically, the civil attorneys on the committee, who had just revised and strengthened the notice provisions in the civil rule, cast the deciding votes.

I recommend that either this Court reject the proposal, or adopt it with the following change to CrR 4.8(b)(2)::

(2) *Notice*. Advance notice of a subpoena for production shall be provided as follows:

(i) *When Required*. Notice of a subpoena for production shall be served on each party in the manner prescribed in subsection (iii).~~provided whenever a party seeks documentary evidence or tangible things belonging or pertaining to a defendant, an alleged victim or complaining witness, or a member of an alleged victim's family or household.~~

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<sup>1</sup> I would note the GR 9 Cover Sheet is inaccurate in that it suggests that the notice provision concerning subpoenas duces tecum in CrR 4.8(b)(2) was a compromise between prosecutors and defense attorneys. Not a single prosecutor supported it.

(ii) Exceptions. Notice of a subpoena for production is not required when an attorney representing a defendant seeks documentary evidence or tangible things belonging solely to or pertaining solely to such defendant. In all other instances, upon a showing of compelling circumstances by ex parte motion of a party, the court may order that notice of a particular subpoena for production is not required. Such court order, along with a copy of the subpoena for which notice is excused, shall be filed under seal pursuant to GR 15.

(iii) Time and Manner. No fewer than five days prior to service of a subpoena for production on the person commanded therein to produce documentary evidence or tangible things, notice of such subpoena shall be provided to each party by serving a copy thereof in the manner prescribed by CR 5(b). The parties may agree to shorten, or the court may shorten upon a showing of good cause by a party, the time between notice and service of a particular subpoena.

Thank you for your consideration of this issue.

Sincerely,

Brian M. McDonald  
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King County Prosecuting Attorney's Office